Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	:	
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Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991	:	CG Docket No. 18-152; 02-278
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	:	DA No. 18-493
	:	

COMMENTS OF JUSTIN T. HOLCOMBE

I am submitting these comments in my individual capacity as a subscriber of cellular telephone services. I also submit this in my professional capacity as an attorney for other consumers who are fed up with the constant barrage of telephone calls from businesses who either ignore the TCPA's consent requirements or continuously look for new ways to skirt them.

I. What Constitutes an Automatic Telephone Dialing System?

The Commission should continue to follow its 2003 reasoning on what constitutes an ATDS,[1] which was not disturbed by the D.C. Circuit.[2] The Commission's prior Rulemaking (as opposed to its later clarifications of its existing Rules) should only be disturbed in a formal Rulemaking proceeding.[3] In short, the Commission's Rules define an ATDS as "equipment which has the capacity to store or produce telephone numbers to be called using a random or

[1] *Rules and Regulation Implementing the Telephone Consumer Protection Act*, 18 FCC Rcd. 14014, ¶ 129-134 (2003) ("2003 TCPA Order").
[2] *See, e.g., Reyes v. BCA Fin. Svcs. Inc.*, 2018 WL 2220417 (S.D. May 14, 2018); *Swaney v. Regions Bank*, 2018 WL 2316452 (N.D. Ala. May 22, 2018).
[3] *See In re Dish Network, LLC*, 28 FCC Rcd. 6574, ¶ 32 (2013) ("creating such a new interpretation is not appropriate for a Declaratory Ruling").

sequential number generator and to dial such numbers."[4]

A. Proper Cannons of Statutory Interpretation.

"In determining the meaning of a statute or regulation, 'the first step is to determine whether the statutory language has a plain and unambiguous meaning by referring to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'"[5] "If the statute's meaning is plain and unambiguous, there is no need for further inquiry."[6] "To determine the plain meaning of a statute or regulation, we do not look at one word or term in isolation, but rather look to the entire statutory or regulatory context."[7] "[S]tatutes should be construed so that no clause, sentence, or word shall be superfluous, void, or insignificant."[8] Finally, "[b]ecause the TCPA is a remedial statute, it should be construed to benefit consumers."[9]

"The TCPA, at least before the wordy analysis of lawyers, courts, and agencies gets to it, simply prohibits 'automatic' dialing… If equipment automatically dials numbers, it cannot be used to call cell phones."[10] An ATDS is "equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers."[11]

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[4] 47 C.F.R. § 64.1200(f)(2). *See also* 47 U.S.C. § 227(a)(1) (similarly defining ATDS).
[5] *SEC v. Levin*, 849 F. 3d 995, 1003 (11th Cir. 2017) (citation omitted).
[6] *Id.*
[7] *Id.*
[8] *Id.* at 1004.
[9] *Gager v. Dell Fin. Servs., LLC*, 727 F. 3d 265, 271 (3rd Cir. 2013).
[10] *Hunt v. 21st Mortg. Corp.*, 2013 WL 12343953, at *4 (N.D. Ala. Oct. 28, 2013) (explaining that "[t]here is no need for deeply technical interpretations" of an ATDS)
[11] 47 C.F.R. § 64.1200(f)(2); 47 U.S.C. 227(a)(1).

B. The Necessary Functions of an ATDS.

The functions a *system* (not necessarily a single device) must be capable of performing are (1) to store *or* produce telephone numbers *to be called* [i.e., for the purposes of being called] using a random or sequential number generator, and (2) to dial such numbers.[12] "The statutory definition contemplates autodialing equipment that either stores or produces numbers."[13] The use of the disjunctive "or" means a system that stores telephone numbers need not also produce such numbers in order to be an ATDS.[14] Any reading of the TCPA that requires an ATDS to "produce" telephone numbers, rather than generate such numbers to be called from a stored database, would ignore the use of the disjunctive "or" and make the word "store" become wholly superfluous.

The text of the TCPA requires that the system have the capacity to store (or produce) telephone numbers "*to be called* using a random or sequential number generator."[15] The modifier "using a random or sequential number generator" follows the words "to be called."[16] Applying the nearest-reasonable-referent cannon, the statement "using a random or sequential number generator" must only modify the words "to be called."[17] If Congress wanted the postpositive modifier to modify "store or produce," the statute would read "equipment which has the capacity (A) to store or produce, using a random or sequential number generator, telephone numbers; and

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[12] 47 C.F.R. § 64.1200(f)(2). *See also* 47 U.S.C. § 227(a)(1) (similarly defining ATDS).
[13] 2003 TCPA Order at ¶ 132.
[14] *See Bourff v. Rubin Lublin, LLC*, 674 F. 3d 1238, 1241 (11th Cir. 2016) (explaining the use of "or" in a similarly worded consumer protection statute).
[15] 47 C.F.R. § 64.1200(f)(2); 47 U.S.C. § 227(a)(1).
[16] *Id.*
[17] *See Parm v. Nat'l Bank of Ca., N.A.*, 835 F .3d 1331, 1336 (11th Cir. 2016) ("'When the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent.'") (*quoting* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 152 (2012)).

(B) to dial such numbers."[18] Instead, Congress wrote the statute to refer to the manner in which numbers are generated[19] *to be called*, whether from a stored database or produced by the system.

There are at least two ways to *automatically* generate numbers from a stored database for dialing, either truly at random or in some sequence (e.g., a dialing algorithm).[20] Of course, if the numbers are *not* automatically generated, a person can call stored telephone numbers by manual/cognitive selection at the time of the call, which would be *neither* random *nor* sequentially generated, and certainly not generated by the *system* (or equipment) at issue. For instance, using the redial function, speed dialing, or calling from a contact list (such as ordinary smart phones) would be *neither* random *nor* sequential because the person calling is manually choosing the telephone number to call at the time of the call, rather than having the number *automatically generated* from the stored database to call the next number in queue. This automatic, system generation of the next number in the dataset *to be called* distinguishes an autodialer from other devices which merely store telephone numbers and then dial them at the caller's command. This is not only the plain reading of the regulation, it is the only reading which gives meaning to every word, including "store," "to be called," and "using a random or sequential number generator."

The Chamber of Commerce would have the Comission find that "generate" means to

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[18] Although because numbers are never "stored using a random or sequential number generator," the doctrine of last antecedent would still limit the modifier to the word "produce" if the regulation were to be written in such a manner.

[19] Definitions of "generate" include "cause (something, especially an emotion or situation) to arise or come about" and "produce (a set or sequence of items) by performing specified mathematical or logical operations on an initial set."
https://www.google.com/search?q=Dictionary#dobs=generate

[20] *See also ACA Int'l v. FCC*, 885 F. 3d 687, 701 (D.C. Cir. 2018) (recognizing that "[a]nytime phone numbers are dialed from a set list, the database of numbers must be called in *some* order—either in a random or some other sequence.").

create something from thin air, only, but this is not so. For example, a saltwater chlorine generator "generates" free chlorine from salt (i.e., NaCl, sodium and chlorine), a windmill "generates" energy from wind, and a dialing system "generates" a sequence of phone numbers to be called from the dialer administrator's database. Accordingly, under the plain meaning of the statute, a system that "stores" a database of phone numbers, and "generates" such numbers to be called (either randomly *or* sequentially) from the stored database, and then dials such numbers, is an ATDS.

Of course, finally, an ATDS must actually dial the numbers. Some systems do store telephone numbers and automatically generate the next number from the dataset to be called, but require a person to actually dial the number. Such a system would not be an ATDS if it lacked the ability to dial (i.e., to actually make the call).

2. The Commissions Prior Statements on Basic Functions of an ATDS.

The Commission has previously stated that the basic functions of an ATDS are to "dial numbers without human intervention" and "to dial thousands of numbers in a short period of time."[21] The Commission should clarify that such statements were prefatory, and that such functions are neither necessary nor sufficient to render a device an ATDS. Rather, a system is an ATDS if it has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers. Again, it is the automatic, system generation of the next number in the dataset coupled with the system performing the actual dialing function that distinguishes an ATDS from other systems.

The Commission should again reiterate that "the purpose of the requirement that

[21] 2003 TCPA Order at ¶¶ 132-133.

equipment have the 'capacity to store or produce telephone numbers to be called' is to ensure that the prohibition on autodialed calls not be circumvented."[22] If the Commission were to require that a specific number of calls be placed within a specific time frame, telemarketers and dialing software providers would just create systems which stop right before the specified line, and they would utilize thousands of such systems in a single call center.

With respect to human intervention, there will always be "*some* act of human agency occurs at some point in the process" and human intervention "will always be a but-for cause of any machine's action."[23] Some systems in use today seek to circumvent the TCPA by utilizing "clicker agents" to repeatedly hit a button on a keyboard or mouse to cause a system to dial numbers which are automatically generated and queued by the system. These systems cause the same problems the TCPA was designed to prevent (e.g., dead air, abandoned calls, excessive number of calls to any single number). The mere fact that some nominal form of automated human intervention is introduced into the process should not be permitted to circumvent the TCPA. Rather, if the *system* stores (or produces) telephone numbers, automatically generates such numbers (at random or in a sequence) to be called (i.e., queues the next number in the dataset), and dials such numbers, such system is an ATDS. On the other hand, if a person is cognitively selecting the next number to call (such as calling from a contact list), such a system would not be an ATDS because the number was not generated/queued by the system.

3. The Words "Capacity" and "Use."

The Commission asks about the word capacity. The Commission should interpret "capacity" based on its ordinary meaning: what does the *system* (not necessarily a device) have

[22] 2003 TCPA Order at ¶ 133.
[23] *See In re Collecto, Inc.*, 14-MD-02513-RGS, 2016 WL 552459, at *4 (D. Mass. Feb. 10, 2016).

the ability to do?[24] If I can change a setting, click a button, or flip a switch to turn on a function, then the system clearly is capable of performing the function.

The statute defines an ATDS by its capacity, and it prohibits using any such *system*. If Congress wanted to limit the application to calls deemed "autodialed," then it would have prohibited "making any autodialed called" rather than the use of a *system* defined by its capacity. If I define a knife as a device with the capacity to cut things, and I use a knife as a lever, I still used a knife. A plain reading of the statute prohibits the use of such *systems*.

With that said, what constitutes a *system* must be a case by case determination. If I have to download a software application to my device (smartphone or computer) to autodial, the *device* itself is not the *system* – the *system* is the software application which contains the necessary capacity to autodial. Of course, these functions could be spread out over multiple applications or devices, in which case they would together constitute a *system*. Callers will attempt circumvent any loophole created by the Commission, and the Commission should be careful not to create specific limitations which could be used by crafty telemarketers to circumvent the TCPA.

II. Reassigned Numbers.

The Commission seeks comment on how to treat calls made to reassigned numbers. As an initial matter, the vast majority of "wrong number" robocalls I come across are not cases of "reassigned numbers" where the caller had the consent of a prior subscriber. They usually result from an improper transcription of a number or a bad skip trace. In some cases, the caller has

[24] *See Hunt v. 21st Mortgage Corp.*, 2013 WL 5230061, at *4 (N.D. Ala. Sept. 17, 2013) (correctly defining "capacity" 2 years prior to the 2015 Order).

consent (such as by contract) to call the "intended recipient" at any number it associates with such person, such as by skip trace. The Chamber of Commerce wants to use the "reassigned number" red herring to convince the Commission to redefine "called party" in a manner which would permit a caller to call any number it finds so long as it has the consent of the person it "intended" to reach.

Two Circuit Courts, and numerous District Courts, have already opined on the meaning of the word "called party," and the Commission should not seek to upend settled precedent.[25] If the "called party" were limited to the "intended recipient," it would severely limit the privacy rights of the consumers not to be subjected to such calls (as well as to revoke consent granted by another person). Callers choose to use autodialing systems. "Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line."[26]

The Commission is working on a database of reassigned numbers, which I commend. Callers should be able to rely upon this database. This is consistent with the Commission's treatment of ported telephone numbers which requires callers to utilize similar databases to scrub wireless numbers.[27]

However, if the Commission were inclined to grant such a safe harbor, its authority would be limited to calls not charged to the called party, subject to such conditions as the Commission may proscribe as necessary in the interest of the privacy rights the TCPA was

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[25] *Osorio v. State Farm Bank, FSB*, 746 F. 3d 1242, 1251 (11th Cir. 2014) (the "called party" is the "current subscriber," and the "current subscriber" includes both "the person who pays the bills or [the person that] needs the line in order to receive other calls."); *Soppet v. Enhanced Recovery Co., LLC*, 679 F. 3d 637, 640 (7th Cir. 2014) (same).
[26] *Boyce Motor Lines, Inc. v. United States,* 342 U.S. 337, 340 (1952).
[27] 2003 TCPA Order at ¶ 170.

intended to protect.[28] If it were to do so, it should only do so by formal rulemaking wherein it discloses the intended regulation and invites comment on the specific proposal. The Commission should also preserve the privacy rights intended to be protected by the TCPA. This would require, at the least, the caller to demonstrate 1) that it actually had the consent of the intended recipient; 2) the intended recipient was a person with the capacity to consent to calls to that telephone number at the time such consent was given (i.e., would have been the "called party" at the time the consent was given), 3) that such number was actually reassigned, 4) that the caller neither knew, nor had reason to know, that the number was reassigned, 5) that the caller utilized the Commissions' reassigned number database within a specific time frame (e.g., 30 days) prior to making the call and the number did not show up as having been reassigned.

III. Revoking Consent.

The Commission's 2015 consent ruling was upheld by the D.C. Circuit, and it should stand. What is reasonable in one case, may not be in another case. What means of revoking consent is reasonable should be determined on a case by case basis. Consent should be "terminated when the actor knows or has reason to know that the other is no longer willing for him to continue the particular conduct."[29] "'[T]he scope of consent, like its existence, depends heavily upon implications and the interpretation of circumstances.'[30] The Commission should simply reaffirm its prior 2015 Order and clarify that consumers may revoke consent through any reasonable means which clearly informs the caller that he no longer wishes for the calls to

[28] 47 U.S.C. § 227(b)(2)(C).
[29] *Osorio v. State Farm Bank, FSB*, 746 F. 3d 1242, 1253 (11th Cir. 2014).
[30] *Schweitzer v. Comenity Bank*, 866 F. 3d 1273, 1279 (11th Cir. 2017).

continue. Of course, if a caller provides easily accessible means of revoking consent (such as by telling the consumer to text "stop" or providing an interactive opt-out mechanism), and the consumer chooses to avail some *other* means to opt out, the consumer's choice not to utilize the caller's easily accessible means would be a factor in determining whether the consumer used reasonable means to revoke consent.

IV. Broadnet.

I agree completely with Statement of Commissioner (now Chairman) Ajit Pai, Approving in Part and Dissenting in Part in *Broadnet*. I also support NCLC's petition, and I reiterate the comments I authored on behalf of Frederick Luster in that proceeding. The Commission should not attempt to redefine a person. Rather, the Commission should permit common law rules of sovereign immunity and Federal statutory liability control under the TCPA like any other Federal consumer protection statute.

When communicating with their own citizens, State and Federal Government entities, and agencies which are arms of the state, are generally protected from suit without their consent due to common law and Eleventh Amendment sovereign immunity.[31] The Supreme Court's decision in *Campbell-Ewald* makes clear that in some instances contractors may be entitled to derivative immunity, but that they do not share in the government's unqualified immunity.[32] These immunity doctrines already provide ample protection from suit for official government actions.

[31] *See, e.g*, *Nevada v. Hall*, 440 U.S. 410, 414-21 (1979) (describing the history of sovereign immunity).
[32] *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 672-674 (2016).

Some governments have created essentially commercial enterprises which operate well outside the political borders of the government, and Courts have determined that such entities are not immune to suit if they are not an "arm of the state"[33] or if they subject themselves to the jurisdiction of a sister state.[34] Generally applicable legal principles, including sovereign immunity, already provide ample protection for government entities from suit. Whether contractors are liable for TCPA violations should be no different than whether they are liable for violations of any other federal statutory provision.

With respect to agency, the Commission was correct. The Commission has long interpreted "on behalf of" in the TCPA as "as an agent of."[35] The reason an agent can be entitled to the consent given to the principal is because we treat such calls as if the principle itself made the calls. In such case, the principal is responsible for the agent's actions (vicarious liability).[36] If the caller is not an agent of the principal, the call is not *from* the principal in any meaningful sense. In such a case, the agent is not entitled to the principal's statutory defenses.

V. Conclusion.

First, the Commission should reaffirm the 2003 Order. Any system which stores *or* produces telephone number *to be called* using a random or sequential number generator, including calling from a database of numbers, and dials such numbers, is an ATDS. The Commission should clarify that its prior statements on the "basic function" of an ATDS were

[33] *See Pele v. Pennsylvania Higher Education Ass'n*, No. 14–2202, 2015 WL 6162942 (4th Cir. Oc.t 21, 2015) (PHEAA is not immune from suit under the Fair Credit Reporting Act); *See also*, *United States ex rel. Oberg v. Pa. Higher Educ. Assistance Agency ("Oberg III"),* No. 15–1093 (4th Cir. filed Oct. 21, 2015) (describing the commercial nature and vast revenue generation of PHEAA's business activities).
[34] *Nevada v. Hall*, 440 U.S. 410, 414-21 (1979).
[35] *See Broadnet* at fn. 77.
[36] *In re DISH Network, LLC*, 28 FCC Rcd. 6574 (2012)

prefatory, and are neither necessary nor sufficient to make a system an ATDS. The word "capacity" refers to what the system is "capable of doing," and a person "uses" an ATDS when he uses the system.

Second, the Commission should implement the reassigned number database that it has proposed, but it should not redefine "called party" from the universally accepted definition.

Third, the Commission should reaffirm that consumers can revoke consent through any reasonable means.

Fourth, the Commission should vacate its decision in *Broadnet* on the issue of whether or not a contractor is a person, but it should continue to apply common law rules of agency in a dual direction when it comes to statutory defenses.

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